

sonable certainty has been reached, he cannot be treated as a criminal and, accordingly, cannot be prevented from moving heaven and earth to prove his innocence or circumstances that diminish his guilt. The regrettable fact that a poor man may not be able to do as much for himself, is no sound reason for reducing the better chances of the monied.

Finally, just as medical science stands behind and beyond the health of present patients, there exists something like the cause of justice itself. What would we think of a country that failed to advance medical science because it concentrated attention on a fully equalized health service for all? And who would wish to forego the stimulation to medical research provided by the ultimate efforts of private doctors in behalf of patients who can reward them generously? These implications are valid for the development of criminal law and procedure. If it is true that the endeavors of outstanding private defenders have been responsible for some progress in the substance of criminal law and in its administration—and there can be little doubt that they have been—then it would be a disservice to society to curtail those endeavors by choking some of the forces that engender them. Even the poor would realize that the vanishing of the great defender, who can grow to his full stature only on the soil of individualism, would be a loss. Although unable to obtain his assistance except when sensational circumstances attend their plight, they, too, look to him as the potential protector of justice and, hence, of their own freedom.

FREEHOLD APPEALS—A PROPOSAL FOR PRE-TRIAL

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Our Civil Practice Act has removed most procedural questions from the field of appellate review.¹ Professor Edson R. Sunderland, the draftsman of the act, says:² "The purpose of the Civil Practice Act has been to eliminate all procedural distinctions, restrictions and requirements of a technical nature which served no substantially useful purpose."

Despite the obvious wisdom of minimizing litigation on questions having no important relation to the merits, we still have a mandatory requirement that "appeals shall be taken directly to the Supreme Court in all

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¹ See list of changes in 18 Jones Ill. Stats. Ann. 19. See also 1 Univ. Chi. L. Rev. 49 (1933) and bibliographies in 18 Jones Ill. Stats. Ann. pp. 32 and 430 (1935).

² 18 Jones Ill. Stats. Ann. 19 (1935).

cases in which a . . . freehold is involved. . . ."³ With similar requirements under previous practice acts this has produced enough procedural litigation so that the mere annotations occupy thirty-two pages of over ten cases per page in our Annotated Statutes.⁴

The Supreme Court has said in *Wright v. Logan*⁵ that a freehold is involved where the necessary result of the judgment is that one gains and the other loses a freehold estate, and also in cases where the title to a freehold is so put in issue by the pleadings that the decision of the case necessarily involves a decision of that issue.⁶ As an arbitrary sampling of the difficulties encountered in applying these principles, consider the "no freehold" cases in the first four years after the adoption of our Civil Practice Act.⁷ As bearing on the importance of the subject of this article the reader should bear in mind that in each of these cases the appellant got nothing for his Supreme Court docket fee, the time of the Supreme Court Justices was spent on a sterile question having nothing to do with the merits, the case was delayed, there were additional printing costs in the appellate court, and the attorney suffered the chagrin of having ushered his client into a pew from which the latter was unceremoniously ejected.

The question naturally arises why such a troublemaker was not covered when similar anachronisms, such as the joinder pitfalls of the common law, were eliminated by our Civil Practice Act. The answer is that our

³ Ill. Rev. Stats., ch. 110, § 75 (1943).

⁴ 18 Jones Ill. Stats. Ann. pp. 440-67 (1935) and pocket supplement, pp. 103-108.

⁵ 364 Ill. 33, 2 N.E. 2d 904 (1936).

⁶ For elaboration of these rules see citations listed under Section 75 of the Civil Practice Act in the Annotated Statutes.

⁷ "Freehold" does not include mere right to do that which in equity will entitle party to a freehold. *Johnson v. Hefferan*, 365 Ill. 359, 6 N.E. 2d 638 (1937); *Steindler v. Knies*, 365 Ill. 59, 5 N.E. 2d 402 (1936).

Where the only question involved on appeal was whether a motion to vacate sufficiently complied with Civil Practice Act, Section 196, a freehold was not involved, as the question presented was only one of procedure. *Hooper v. Wabash Automotive Corp.*, 365 Ill. 30, 5 N.E. 2d 462 (1936).

Where questions involving freehold were decided on former appeal, and only questions raised in assignments of error and brief were those of pleading and practice, the liability of appealing defendant to account, and the correctness of the amount found due by decree, the Supreme Court was without jurisdiction on the appeal, a freehold not being involved. *Fyffe v. Fyffe*, 364 Ill. 281, 4 N.E. 2d 368 (1936).

Supreme Court does not have jurisdiction on direct appeal in proceeding involving freehold, unless freehold is involved in issues to be settled on review as well as in original proceeding. *McGrath v. Dunne*, 363 Ill. 549, 2 N.E. 2d 895 (1936); *Schrader v. Schrader*, 357 Ill. 623, 192 N.E. 648 (1934).

In suit to foreclose trust deed on property conveyed to settlor by certain club, which guaranteed bonds secured by trust deed, wherein several club members answered claiming that their undivided interests in club's property were not subject to trust deed, fact that foreclosure decree fastened lien of trust deed on such members' interest did not "involve freehold," as re-

antiquated constitution of 1870,⁸ in authorizing appellate courts, provides that appeals shall lie from them to the Supreme Court in cases in which a freehold is involved. Thus the general assembly not only lacks the power to eliminate these questions in the trial court as it has eliminated the joinder questions; it must permit all of them to get to the Supreme Court. Should we accept as final the fact that the Civil Practice Act draftsmen left matters as they were? Several alternatives deserve consideration.

The first and most obvious point is that the freehold difficulty should be added to the long list of reasons for replacing our ancient and unnecessarily detailed constitution of 1870. Matters of this type are proper subject of legislative discretion and experiment. They ought not to be imbedded in the rigid framework of a constitution, particularly of a practically unamendable constitution like ours. Since the prospects of early adoption of a modern constitution are not bright, we must consider what can be done within the present restrictions.

One part-way measure that definitely could be tried is for the Supreme Court to adopt a rule summarizing the case law in the freehold field. In something of this spirit, the Supreme Court of South Dakota has recently adopted as a rule of court the full text of the Uniform Expert Testimony Law. In view of the fact that the freehold subject-matter occupies thirty pages in Dodd and Edmunds' *Illinois Appellate Procedure* and seventeen pages in a series of articles by another author,⁹ we cannot expect a complete treatise, but it should be possible to cover the points on which confusion seems most serious. Such a device should cut down the number of false starts attributable to sheer ignorance in clear-cut cases. It would not solve the difficulty in the cases where the legal question is close.

My next suggestion is that the Supreme Court originate, on analogy to pre-trial in the lower courts, an inexpensive and simple procedure by

gards Supreme Court's jurisdiction. *National Bank of Republic of Chicago v. 168 Adams Bldg. Corporation*, 359 Ill. 27, 193 N.E. 511 (1934).

To give jurisdiction of a direct appeal to the Supreme Court, freehold must be directly involved and not merely collaterally, contingently, or indirectly. *Schmitt v. Wright*, 357 Ill. 509, 192 N.E. 562 (1934).

Mortgage foreclosure does not "involve freehold," bringing case within Supreme Court's jurisdiction, since payment of sum found to be due would relieve land entirely from lien established. *Kagy v. Luke*, 357 Ill. 512, 192 N.E. 559 (1934).

These digest paragraphs are taken from the annotation following Civil Practice Act, Section 75, in the Ill. Rev. Stats. of 1937.

⁸ Art. VI, § 11.

⁹ Liessmann, "When Is a Freehold Involved," 8 Ill. L. Rev. 176 (1913); Leesman, "When Is a Freehold Involved," 14 Ill. L. Rev. 223 (1919); 20 id. 820 (1926); 21 id. 808 (1927).

which debatable jurisdictional questions could be submitted in advance. The procedure would resemble that by which the United States Supreme Court notes probable jurisdiction of appeals.¹⁰ If our court noted probable jurisdiction, the case would proceed with the usual printed abstracts and briefs. In the nonjurisdiction cases most litigants would acquiesce and transfer their attentions to the appellate court, but as long as our present constitution stands, a self-confident appellant would presumably be permitted to proceed in the Supreme Court ignoring adverse preliminaries.

Obviously this article cannot fill in the details. The jurisdictional question might be handled before or after docketing; before the full court, or in chambers before the member from the appellant's district. Instead of a partial record, the trial court might be directed to certify the question with relevant facts. Other variations or substitutes may be weighed. But there should be no difference of opinion as to the desirability of reducing litigation on these procedural questions.

My closing suggestion is that an effort be made to cut down the space devoted to such freehold questions as get through the screening process. Where a case is transferred to the appellate court on an old no-freehold point, why should the opinion be published in full? The present Supreme Court Rule 57 (2) says that each *appellate* court shall designate for publication "only such written decisions of such court as contain a discussion of a new or doubtful question of law, or involve the application of rules of law to a novel state of facts, or decide a new or unsettled question of practice." The implication that Supreme Court opinions are to be published in full even if they do not satisfy these reasonable requirements of novelty is supported by two successive cases¹¹ transferred to the appellate court last November in opinions of full average length devoted entirely to examination of freehold facts and application of principles already well

¹⁰ U.S.S.C. Rule 12 says: "Upon the presentation of a petition for the allowance of an appeal to this court . . . there shall be presented by the applicant a separate typewritten statement particularly disclosing the basis upon which it is contended that this court has jurisdiction upon appeal to review the judgment or decree in question. The statement shall refer distinctly (a) to the statutory provision believed to sustain the jurisdiction . . . [other items are listed]. The statement shall show that the nature of the case and the rulings of the court were such as to bring the case within the jurisdictional provisions relied on and shall cite the cases believed to sustain jurisdiction." If the appeal is allowed, the rule provides for subsequent docketing and printing.

Some analogies might also be drawn from Section 77 of the Illinois Civil Practice Act setting up a special procedure for appeals from orders granting new trials and from Supreme Court Rule 30 adopted in connection therewith.

¹¹ *Cohen v. Oguss*, 384 Ill. 353, 51 N.E. 2d 461 (1943); and *Munyon v. Wilson*, 384 Ill. 350, 51 N.E. 2d 464 (1943).

established. These two cases supplied the impetus for the present article. The Supreme Court should change its rules and procedures so as to avoid such waste.¹²

I have selected freehold as a typical question. Consideration should be given to applying the same techniques to questions of franchise, which are treated like freehold in the constitution and statute, and to constitutional questions.

The court can hardly be expected to go out of its way to adopt the suggested reforms without some assurance that the step would be welcomed by the Bar. Expressions of opinion would seem desirable.

¹² If Rule 57 (2) is to be revised on our point of substance, the confusion between singular and plural in "such decisions . . . as contain a discussion" might also be eliminated.